No. 04-980

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner*,

v.

RONALD L. SANDERS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court grant certiorari to review the determination that California is a "weighing state" and therefore bound by *Clemons v. Mississippi*, 494 U.S. 738 (1990), where petitioner did not dispute that determination in either the District Court or the Court of Appeals and where that determination is consistent with decisions of this Court and state law?

2. Should the Court grant certiorari to consider whether the determination that California is a "weighing state" under *Clemons v. Mississippi*, 494 U.S. 738 (1990), created a new rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), where petitioner never asserted a *Teague* defense in either the District Court or the Court of Appeals and where this Court already has held that *Clemons* claims are not barred by the *Teague* doctrine?

3. Should the Court grant certiorari to review the determination that the California Supreme Court failed to engage in adequate constitutional harmless error analysis as required by *Clemons v. Mississippi*, 494 U.S. 738 (1990), where petitioner never asserted its argument on the issue in either the District Court or the Court of Appeals and where the state court never purported to describe its review as a "harmless error" inquiry and instead relied upon this Court's holding in *Zant v. Stephens*, 462 U.S. 862 (1983)?

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STATEMENT OF THE CASE

In 1993, respondent Ronald L. Sanders (hereafter "Sanders") filed a pre-AEDPA habeas petition in the United States District Court for the Eastern District of California challenging his state conviction for murder and other crimes and his sentence of death. The proceedings began in 1981, when the State of California charged Sanders and a codefendant with the attempted murder of a drug dealer, Dale Boender, and the murder of Boender's girlfriend, Janice Allen, during a robbery and burglary. Sanders also was charged with attempted robbery of the same couple a few days before the murder.

The first trial of Sanders and his codefendant resulted in a mistrial when the jury could not reach a unanimous verdict as to the defendants' guilt. App. A at 8894. There was good reason for the jury's inability to convict. Contrary to the statement of the case presented by petitioner, Warden Jill L. Brown (hereafter "the State"), there was no finding that Sanders actually killed Allen or attempted to kill Boender. Before he was attacked, Boender heard one of the assailants say he wanted to leave Boender's apartment and the other say he wanted to stay. App. A at 8893-94. Boender was unable to identify who wanted to stay and who wanted to leave. App. A at 8894. At trial, the prosecutor conceded that there was no direct evidence that Sanders was the actual killer and acknowledged that Sanders might not have been the killer. RT 1526. On direct appeal, the California Attorney General agreed "that it is unclear who personally killed Ms. Allen." *People v. Sanders*, No. 22512, Respondent's Brief at 101. Indeed, the uncertainty about Sanders's personal culpability for the crimes was an important factor in the Circuit Court's assessment of this case. App. A at 9008, 9010-11.

At a retrial in 1982, Sanders and his codefendant ultimately were convicted of all charges. The jury found both defendants eligible for the death penalty by finding four special circumstances

true: the burglary-murder special circumstance, the robbery-murder special circumstance, the witness-murder special circumstance, and the especially-heinous-atrocious-and-cruel-murder special circumstance. After being instructed to weigh the aggravating factors, including the four special circumstances found to be true, against the mitigating factors, the jury returned a death sentence against Sanders. The prosecutor waived his request for a death sentence against the codefendant, who was sentenced to life in prison without the possibility of parole.

In 1990, the California Supreme Court affirmed Sanders's conviction and death sentence. *People v. Sanders*, 51 Cal.3d 471, 797 P.2d 561 (1990); App. C. The state court invalidated two of the four special circumstances the jury found true – the burglary-murder special circumstance and especially-heinous-atrocious-and-cruel-murder special circumstance. Nevertheless, the court rejected Sanders's claim that his death sentence must be set aside. Without acknowledging this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and instead relying on *Zant v. Stephens*, 462 U.S. 862 (1983), the California Supreme Court held that consideration of the invalid heinous-murder special circumstance and invalid burglary-murder special circumstance in deciding to impose the death penalty was "benign" and added that there was "little chance" that Sanders was prejudiced by consideration of the invalid burglary-murder special circumstance. App. C at 68-69. On May 28, 1991, the judgment became final when this Court denied certiorari on direct appeal. *Sanders v. California*, 500 U.S. 948 (1991).

Throughout this litigation, Sanders argued that California is a "weighing state" as that term is used in *Clemons v. Mississippi*, 494 U.S. 738. *Sanders v. Woodford*, United States District Court, CV-F-92-5471-REC-P, Memorandum of Point and Authorities in Support of Second Amended Petition for Writ of Habeas Corpus at 385-86. Accordingly, Sanders argued that once the state supreme court had invalidated two of the four special circumstances

considered by the jury in deciding that he should be executed, the state supreme court was obligated to perform a harmless error analysis in accord with *Clemons*. *Id.*

The State did not dispute that California is a weighing state. *Sanders v. Woodford*, CV F-92-5471 REC-P, Answer to Second Amended Petition for Writ of Habeas Corpus at 226-27. Instead, the State's only argument was that the state supreme court had complied with *Clemons* and had applied constitutional harmless error analysis. *Id.* The State did not assert that relief on this claim would be barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 228. *Id.* On August 24, 2001, the District Court denied Sanders's petition for writ of habeas corpus. App. 8996.

On appeal, Sanders again argued that (1) California is a "weighing state" as that term is used in *Clemons* and (2) therefore the state supreme court (having voided two of the four special circumstance allegations in the case) was obligated to perform a harmless error analysis in accord with *Clemons*. *Sanders v. Woodford*, No. 01-99017, Appellant's Opening Brief at 67-72. Once again, the state did not dispute that California is a weighing state. *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 42-49. Once again, the State's only argument was that the state supreme court had complied with *Clemons* and had applied constitutional harmless error analysis. *Id.* Once again, the state did not assert that relief on this claim would be foreclosed by *Teague v. Lane*, 489 U.S. 228.

On July 8, 2004, the Court of Appeals (Judges Fisher, Kleinfeld, and D. Nelson) unanimously reversed the death judgment and conditionally granted the writ as to the penalty phase. Rejecting the argument that the State *had* made, the panel unanimously held that after invalidating the two special circumstances, the California Supreme Court did not remand for resentencing and did not conduct an independent reweighing or a proper harmless-error review as

required by *Clemons*. App. A at 9017. The three-judge panel held that (1) California is a weighing state (App. A at 8999-9003); (2) after invalidating two of the special circumstances considered by the jury in deciding to impose the death penalty, the state court conducted inadequate harmless-error review which deprived Sanders of the individualized death sentence to which he was entitled under the Eighth Amendment (App. A at 9003-06); and (3) the state court's inadequate harmless-error analysis had a substantial and injurious effect on the jury's penalty verdict (App. A at 9006-11). Although the State seeks review on certiorari of the first two rulings, it does not challenge the Circuit Court's conclusion that the Eighth Amendment error was prejudicial.

The State sought rehearing en banc. For the first time in years of litigating this case, the State now argued that California is not really a weighing state at all. *Sanders v. Woodford*, No. 01-99017, Respondent's Petition for Rehearing en Banc at 1, 3-16. On October 13, 2004, the three-judge panel of the Court of Appeals unanimously denied the State's petition for rehearing en banc, reporting that "[t]he full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to hear the matter en banc. Fed. R.App.P. 35."

On January 11, 2005, the State served its Petition for Writ of Certiorari, and Sanders's response is due by February 23, 2005.

ARGUMENT

I. THIS COURT SHOULD DENY REVIEW OF THE STATE'S ARGUMENT THAT CALIFORNIA IS NOT A WEIGHING STATE BECAUSE THAT ARGUMENT NEVER WAS PROPERLY RAISED BELOW AND THE CIRCUIT COURT'S DETERMINATION IS CLEARLY CORRECT.

The State's failure to dispute that California is a weighing state in the lower courts is reason enough to deny review on certiorari. In addition, the question of whether California is a weighing state for purposes of *Clemons v. Mississippi*, 494 U.S. 738, does not meet the criteria for review set forth in Supreme Court Rule 10. The Circuit Court decision that California is a weighing state resulted from a straightforward application of this Court's well-established law on the difference between weighing and nonweighing death penalty statutes and is fully consistent with both the plain language of California Penal Code section 190.3 and the California Supreme Court's view of the California death penalty statute.

A. This Court Should Not Review on Certiorari an Argument Belatedly Raised by the State for the First Time in a Petition for Rehearing En Banc.

Throughout the litigation of Sanders's *Clemons* claim in federal court, the State never has disputed that California is a weighing state. As noted above, in both the District Court and the Court of Appeals, the State's only argument was that there was no *Clemons* error because the state court's harmless error review was constitutionally sufficient under *Clemons*. *Sanders v. Woodford*, CV F-9205471 REC-P, Answer to Second Amended Petition for Writ of Habeas Corpus at 226-27; *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 42-49.

As also noted above, when the State lost on appeal, it seized on an entirely new argument in its petition for rehearing en banc. Now the State attacked the conclusion that California is a weighing state as a "false premise," even though the State had acceded to this premise for years. *Sanders v. Woodford*, No. 01-99017, Respondent's Petition for Rehearing at 1, 3-16. Under the

view of the state scheme advocated by the State for the first time in its rehearing petition, California may seem "at first blush" to be a weighing state, but it is not "a true weighing state." *Id.* at 5. Rather, in the State's new view, California's death penalty is a "hybrid" statute, *id.* at 3, 12, 13, to which neither the weighing category, as defined in *Clemons v. Mississippi*, 494 U.S. 738, nor the nonweighing category, as defined in *Zant v. Stephens*, 462 U.S. 862 (1983), applies. *Id.* at 13.

The State did not attempt to present any reasons, let alone exceptional circumstances, for the Court of Appeals to review arguments raised for first time in its petition for rehearing en banc. *See, e.g.*, *Picazo v. Alameida* 366 F.3d 971, 972 (9th Cir. 2004) (finding that the State waived the argument, raised for first time in the petition for rehearing, that a new standard of review applied in habeas cases involving state court harmless error findings); *United States v. Patzer*, 284 F.3d 1043, 1046 (9th Cir. 2002) (holding that "completely new theory" of probable cause raised in the petition for rehearing was waived where "there is no reason it could not have been argued in the Government's original response brief."); *United States v. Lewis*, 798 F.2d 1250 (9th Cir. 1986) (declining to address government's argument, raised for first time in a petition for rehearing, that defendant waived severance). In light of the patently inadequate way in which the State presented the issue to the Circuit Court, it is hardly surprising that not only was the panel's decision to deny rehearing en banc unanimous, but that "no judge of the [full] court . . . requested a vote on whether to rehear the matter en banc." App. B.

In its Petition for Writ of Certiorari, the State changes course yet again and now argues that California's statute creates a nonweighing death penalty scheme. Petition at 4-10. Although this Court has the power to review a question that was decided in the Court of Appeals, even when the petitioner did not present the issue, *United States v. Williams*, 504 U.S. 36, 41 (1992),

it should decline to grant review of the State's belatedly-raised and newly-revised position about whether California is a weighing state. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 333-334 (2002) (precluding a party from disputing a premise that it had failed to challenge in the lower courts). The "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition." *Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985). Having assumed that California is a weighing state in both the District Court and the Court of Appeals, the State's "bait and switch" strategy unjustifiably asks this Court to entertain arguments that could have been presented, fully explored, and resolved by the Circuit Court. This Court should decline to review Question 1.

B. The Determination of the Circuit Court that California is a Weighing State is Consistent with the Decisions of this Court and California's Own View of its Death Penalty Statute.

For over two decades, this Court has taken a common-sense approach to determining whether death penalty statutes create "weighing" or "nonweighing" states. The crucial distinction lies in the role of aggravating circumstances. In a nonweighing state, an aggravating circumstance functions only to narrow "the class of persons convicted of murder who are eligible for the death penalty," but it "does not play any role in guiding the sentencing body in the exercise of its discretion" to impose a death sentence on a death-eligible defendant. *Zant v. Stephens,* 462 U.S. at 874; *Stringer v. Black,* 503 U.S. 222, 231-32 (1992). In contrast, in a weighing state "the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances." *Clemons v. Mississippi,* 494 U.S. at 745; *Zant v. Stephens,* 462 U.S. at 873 n.12. The Court has routinely found that states that require the jury to weigh aggravating and mitigating factors in deciding

whether or not to impose the death penalty are "weighing states." *Parker v. Dugger,* 498 U.S. 308, 318 (1991) (Florida); *Stringer v. Black,* 503 U.S. at 229 (Mississippi); *Richmond v. Lewis,* 506 U.S. 40, 46 (1992) (Arizona).

California's 1978 death penalty law fits squarely within this straightforward definition. California Penal Code section 190.3 sets forth the aggravating and mitigating factors which a jury may consider in choosing between life and death. It then explicitly requires the jury to select a sentence by weighing the aggravating factors against the mitigating factors:

> [T]he trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in the state prison for a term of life without the possibility of parole.

Cal. Pen. Code § 190.3. The jury instruction given to Sanders's jury tracked this statutory provision verbatim. App. C at 69, 85. California's unequivocal provision that the weighing of aggravating and mitigating factors is a prerequisite to imposing a death sentence establishes that California is a weighing state.

This Court repeatedly has noted that the California statute directs juries to weigh aggravating and mitigating circumstances in determining the penalty in a capital case. *Boyde v. California,* 494 U.S. 370, 374, 377 (1990); *California v. Brown,* 479 U.S. 538, 540 (1983); *California v. Ramos,* 463 U.S. 992, 995, n.3 (1983). In addition, 14 years ago, two members of the Court noted specifically that California is a weighing state. Dissenting from denial of certiorari in *Pensinger v. California,* 502 U.S. 930 (1991), Justice O'Connor, joined by Justice Kennedy, accurately observed that California, like Mississippi, "requires its juries to weigh aggravating and mitigating circumstances" *id.* at 931, and that the California Supreme Court's

harmless error analysis after invalidating one of two special circumstances was incompatible with *Clemons*. *Id.* at 931-32.

The California Supreme Court also has consistently described the penalty selection decision under California's 1978 law as a "weighing" process in which the jury weighs the listed aggravating and mitigating factors against each other and is authorized to return a death sentence *only* if the jurors determine that the aggravation outweighs the mitigation. *See, e.g., People v. Marks*, 31 Cal.4th 197, 233, 72 P.3d 1222, 1246 (2004), *cert. denied,* 124 S.Ct. 2101 (2004); *People v. Arias,* 13 Cal.4th 92, 171, 913 P.2d 980, 1030 (1996), *cert. denied*, 520 U.S. 1251 (1997); *People v. Duncan,* 53 Cal.3d 955, 978, 810 P.2d 131, 144 (1991), *cert. denied*, 503 U.S. 908 (1992); *People v. Hendricks*, 44 Cal.3d 635, 654-55, 749 P.2d 836, 846-47 (1988), *cert. denied*, 488 U.S. 900 (1988); *People v. Brown,* 40 Cal.3d 512, 544, 726 P.2d 516, 532-34 (1985), *rev'd on other grounds, California v. Brown*, 479 U.S. 538 (1987).[1]

But the California Supreme Court has gone even further. The state court itself has ruled that *Clemons* harmless error review applies in California. In *People v. Holt*, 15 Cal.4th 619, 693, 937 P.2d 213, 261 (1997), *cert. denied*, 522 U.S. 1017 (1997), the California Supreme Court rejected the defendant's claim that the reversal of a special circumstance or a felony conviction, which are considered as aggravating factors at the penalty phase, automatically requires reversal

[1] Even the California Attorney General has underscored the centrality of California's weighing process. In its brief in this Court in *Boyde v. California*, 494 U.S. 370, the State described the "weighing of aggravating and mitigating circumstances" as "the heart of the California procedure." Respondent's Brief on the Merits at 40 n.12; *see also id.* at 72-75 (extolling the virtues of California's weighing requirement). The Attorney General's claim here that California is a nonweighing state simply cannot be squared with the emphasis he placed on California's weighing procedure in *Boyde*.

of the death penalty. Its explanation was simple:

> Harmless error standards may be applied to penalty phase error. (*Sochor v. Florida* (1992) 504 U.S. 527, 532; *Stringer v. Black* (1992) 503 U.S. 222, 230; *Clemons v. Mississippi* (1990) 494 U.S. 738.)

Id. at 261 (parallel citations omitted). The citation to *Clemons* and its progeny makes sense only if the state court views California's death penalty to be a weighing scheme. As this Court noted in *Stringer*, "[i]t would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. at 235.[2]

[2] The State argues that the California Supreme Court's citation of *Zant v. Stephens,* 462 U.S. 862, in the direct appeal opinion in this case was the state court's shorthand way of declaring California has a nonweighing scheme. Petition at 9; *see*, App. A at 9003-04. Of course, this entirely ignores the state court's subsequent and specific citation of the *Clemons* harmless error rule. *People v. Holt*, 15 Cal.4th at 693. Moreover, the State's imaginative theory inflates the citation to *Zant* in this case with far more meaning than it can hold.

When this case was decided, the California Supreme Court had not yet acknowledged that this Court had articulated different rules for assessing the effect of invalid aggravating circumstances in weighing and nonweighing states. Rather, the state court uniformly had relied on *Zant v. Stephens*, 462 U.S. 862 (1983), in reviewing claims that the jury was improperly influenced by the presence of invalid special circumstances. Thus, it is not surprising that the state court in this case cited *Zant* for the proposition that "[t]he United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors." App. C at 67. Especially in light of *Holt*, the citation to *Zant* is wholly insufficient to serve as a "shorthand signal" for a holding that California is a nonweighing state – a proposition that the California Supreme Court, to this day, never has endorsed. *Sochor v. Florida,* 504 U.S. 527, 540 (1992).

In addition, the State's reading of the citation to *Zant* in its Petition for Writ of Certiorari is starkly inconsistent with its prior understanding of that citation. In the Court of Appeals, the State minimized the citation to *Zant*, asserting that "[t]he California court's reliance on *Zant* was proper since it cited *Zant* only for the proposition that a conviction can be upheld even when there is an invalid factor in aggravation." *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 44. The State argued that there was no error because the state court did not automatically affirm the death sentence. *Id.* at 45. Of course, if the citation to *Zant* means what the State now contends, *i.e.*, that California is a nonweighing state, then an automatic affirmance would have been permissible. The State's contradictory arguments about the *Zant* citation underscore the weakness of its basic position and its failure to present to the courts below the theories on which it now relies. Both are reasons to deny certiorari.

In urging a contrary result, the State attempts to extract from *People v. Bacigalupo*, 6 Cal.4th 457, 862 P.2d 808 (1993), *cert. denied*, 512 U.S. 1253 (1994), a ruling that "while the state scheme required juries to 'weigh' aggravation and mitigation to reach a penalty determination, California is not a weighing state . . . ." Petition at 9. The State offers no analysis or explanation of its novel reading of the case. The actual holding in *Bacigalupo* is that the statutory sentencing selection factors in California Penal Code section 190.3 are not subject to the Eighth Amendment vagueness standard set forth in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Maynard v. Cartwright*, 486 U.S. 356 (1988). *Bacigalupo*, 6 Cal.4th at 476-77, 862 P.2d at 819. The California Supreme Court in *Bacigalupo* did not address the constitutional remedy when the state court invalidates special circumstances that the jury considered as aggravating factors under section 190.3 in determining the penalty. Notably, nowhere in the opinion does the California Supreme Court purport to conclude that California is a nonweighing state.

The State also asserts that allegedly unique features of California's law create a nonweighing statute. Petition at 4-7. However, the California statute is indistinguishable in any meaningful way from that of Mississippi, which this Court has held to be a weighing state. *Clemons v. Mississippi*, 494 U.S. at 745; *Stringer v. Black*, 503 U.S. at 229. The Mississippi capital-sentencing scheme shares most of the features that the State claims render California's law nonweighing. In both states, death eligibility is determined at the guilt phase, and the defendant enters the penalty with at least one aggravating factor already found against him. Cal. Pen. Code §§ 190.2 and 190.3, factor (a); Miss. Code Ann. §§ 97-3-19(2) and 99-19-101(5); *Brown v. State*, 682 So.2d 340, 354-55 (Miss. 1996), *cert. denied*, 520 U.S. 1127 (1997); *Hill v. State*, 432 So.2d 427, 458 (Miss. 1983), *cert. denied*, 464 U.S. 977 (1983); *see also Williams v. State*, 684 So.2d 1179, 1190-91 (Miss. 1996), *cert. denied*, 520 U.S. 1145 (1997). And in both states, at

the penalty phase the prosecutor can attempt to prove additional aggravating factors (beyond the death-eligibility circumstances) only from a discrete statutory list. *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782, 790 (Cal. 1985); *People v. Coffman*, 34 Cal.4th 1, 109, 96 P.3d 30, 112 (2004); Miss. Code Ann. § 99-19-101(5).

Perhaps most important, the rules governing the weighing procedure are almost identical in California and Mississippi. The weighing of aggravation and mitigation is not a mechanical process. *People v. Brown*, 40 Cal.3d at 544 n.17, 726 P.2d at 534 n.17; *see Boyde v. California*, 494 U.S. at 374 n.3; *Wilcher v. State*, 635 So.2d 789, 792-93 (Miss. 1993), *cert. denied*, 469 U.S. 873 (1984). Even if juries find that the aggravation outweighs the mitigation, they still must decide that the death penalty is the appropriate punishment. *People v. Brown*, 40 Cal.3d at 541, 726 P.2d at 532; Miss. Code Ann. § 99-19-101(2)(d); *Gray v. Lucas*, 677 F.2d 1086, 1106 (5th Cir. 1982), *cert. denied*, 461 U.S. 910 (1983); *Brown v. State*, 682 So.2d at 354. Moreover, juries can reject a death sentence in favor of a life verdict even if they find that there are no mitigating circumstances. *People v. Duncan*, 53 Cal.3d at 979, 810 P.2d at 144; *Tokman v. State*, 435 So.2d 664, 670 (Miss. 1983), *overruled on other grounds*, *Willie v. State*, 585 So.2d 660, 681 (Miss. 1991); *Clemons v. State*, 535 So.2d 1354, 1361 (Miss. 1988), *rev'd on other grounds*, *Clemons v. Mississippi*, 494 U.S. 738 (1990). In short, California, no less than Mississippi, is a weighing state.[3]

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[3] Contrary to the State's contention, the use of a unitary list of sentencing factors, rather than lists of separately labeled aggravating and mitigating circumstances, does not subvert the weighing character of the statute. The California Supreme Court has been clear that *only* factors (a), (b), (c) and (i) can be considered as aggravating factors and the remaining factors can be considered only as mitigating. *People v. Morrison*, 34 Cal.4th 698, 728, 101 P.3d 568, 589 (2004); *People v. Hamilton*, 48 Cal.3d 1142, 1184, 774 P.2d 730, 755 (1989), *cert. denied*, 494 U.S. 1039 (1990), and that there is no need for instructions to designate which factors are aggravating and which are mitigating because jurors readily can identify them as such on their own. *People v. Benson*, 52 (continued...)

In the final analysis, this is a simple issue. The jury was told it should decide if Sanders would live or die by weighing aggravating factors against the mitigating factors. That makes California a weighing state. This Court should deny certiorari as to Question 1.

II. THE COURT SHOULD DENY REVIEW OF THE STATE'S TARDY ASSERTION OF A *TEAGUE* BAR, WHICH IS INAPPLICABLE TO THE DETERMINATION THAT CALIFORNIA IS A WEIGHING STATE UNDER *CLEMONS v. MISSISSIPPI.*

This Court should deny review of the State's *Teague* claim because the issue never was presented to the courts below. The issue also has no merit. This Court already has held that *Clemons* did not result in a *Teague*-barred new rule, and this Court has applied the *Clemons* rule to other states without any mention of a *Teague* problem.

A. This Court Does Not Review a Question Presented by the Petitioner for the First Time in A Petition for Writ of Certiorari.

The State asks this Court to consider a claim under *Teague v. Lane*, 489 U.S. 228 (1989), that it failed to raise at any point before reaching this Court. As noted above, the State did not assert *Teague* in the District Court, although it raised procedural defenses to many other claims. *Sanders v. Woodford*, CV F-92-5471 REC-P, Answer with Points and Authorities to Second Amended Petition for Writ of Habeas Corpus at 7-10. Nor did the State assert *Teague* in the Court of Appeals, either in its opposition to Sanders's application for a Certificate of Appealability on his *Clemons* claim or in its briefing on the merits. *Sanders v. Woodford*, No. 01-99017, Opposition to Petitioner's Application for Certificate of Appealability at 35-37; *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 41-51. Indeed, the State has readily admitted, but has not justified, its failure to assert *Teague* below. Petition at 11 n.4. The State nowhere

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[3] (...continued)
Cal.3d 754, 802, 802 P.2d 330, 359 (1990), *cert. denied*, 502 U.S. 924 (1991).

suggests that its omission resulted from an inadvertent or negligent oversight.

The *Teague* bar is not jurisdictional, *Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990), and this Court need not entertain the defense if the State has not raised it. *Schiro v. Farley*, 510 U.S. 222, 229 (1994). In other death penalty cases, the Court has refused to rule on *Teague* claims that were not raised in the lower courts. *See, e.g., Hopkins v. Reeves*, 524 U.S. 88, 93 n.3 (1998) ("Because the State raised this argument for the first time in its petition for writ of certiorari, we choose to decide the case on the merits"); *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993) (refusing to reach the issue "because petitioner did not raise a *Teague* defense in the lower courts or in his petition for writ of certiorari"); *Schiro v. Farley*, 510 U.S. at 228-29 (refusing to reach the issue because petitioner did not raise a *Teague* argument in the lower courts or in its opposition to certiorari). The Court should do the same here.

The State asks this Court for a second chance to defeat Sanders's *Clemons* claim. Having withheld its *Teague* defense from the lower courts in an attempt to win the issue on the merits, the State now, having lost, seeks to win by playing *Teague* as it procedural trump card. This Court rejected such a sandbagging strategy with regard to an exhaustion defense in a pre-AEDPA case, and its reasoning applies as well to the *Teague* defense in this pre-AEDPA case:

> We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event" – in this case, the proceeding in the District Court – is over. Although the record indicates that the State's failure to raise the nonexhaustion defense in this case was the result of inadvertence, rather than a matter of tactics, it seems unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use on appeal if necessary.

Granberry v. Greer, 481 U.S. 129, 132 (1987) (citations and footnote omitted). Moreover, "in this case, not only is the 'main event' completed, the rematch is finished as well," because the State did not even bother to raise the *Teague* bar in its petition for rehearing en banc. *Boardman*

v. Estelle, 957 F.2d 1523, 1537 (9th Cir. 1992) (applying *Granberry* to decline review of a *Teague* claim raised for the first time in a rehearing petition), *cert. denied*, 506 U.S. 904 (1992). The State's tactic not only seeks unfair advantage in litigating this claim but, as discussed with regard to Question 1, wastes the limited resources of the federal courts. *See ante* at page 7. The Court should not countenance such gamesmanship particularly in a capital case.[4]

B. The Determination that California is a Weighing State under *Clemons v. Mississippi* Did Not Create A New Rule under *Teague v. Lane*.

The State's tardy assertion of the nonretroactivity rule recycles its complaints about the Circuit Court's merits ruling. *See* Petition at 12. Its disagreement with the decision that California is a weighing state under *Clemons*, however, does not implicate *Teague*. *Teague*'s essential point is that a petitioner seeking habeas corpus relief in federal court cannot benefit from a new rule announced *after* his or her conviction became final. *Teague v. Lane*, 489 U.S. at 301; *Stringer v. Black*, 503 U.S. at 227. This threshold fact is missing here. *Clemons* was decided on March 28, 1990, *before* Sanders's conviction became final on May 28, 1991. The Circuit Court's decision was a straightforward application of existing precedent to California's death penalty statute. Thus, *Teague* does not apply to this case.

But even assuming a *Teague* analysis were appropriate, the nonretroactivity rule would not foreclose the relief granted by the court below. It is noteworthy that the State does not cite a single case to support its *Teague* claim, *see* Petition at 11-12, presumably because this Court already has held that *Clemons* did not create a new rule under *Teague*. *Stringer v. Black*, 503

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[4] The State notes another panel of the Court of Appeals in another case, *Beardslee v. Brown*, 393 F.3d 1032 (9th Cir. 2004), *cert. denied*, ___ U.S. ___, 2005 WL 92495 (January 18, 2005) recently decided the *Teague* issue raised in this Court. The ruling in *Beardslee*, however, does not excuse the State's waiver of the defense here. In *Beardslee*, the Circuit Court recognized that there was no *Teague* problem: "[i]f *Teague* precluded relief in this case, it necessarily would have precluded relief in *Sanders*, which it did not." *Id.* at 1040.

U.S. at 229-32 (no *Teague*-bar in a case where the conviction was final in 1985). *Stringer* found that *Clemons*'s application of an existing constitutional rule – the rule applied to Florida in *Barclay v. Florida*, 463 U.S. 939 (1983) – to a different state's capital-sentencing statute (Mississippi's) did not violate *Teague*. *Stringer v. Black*, 503 U.S. at 231-32.

After *Stringer*, this Court applied *Clemons* to Florida in *Parker v. Dugger*, 498 U.S. 308 (1991), and Arizona in *Richmond v. Lewis*, 506 U.S. 40 (1992), without finding that a new rule was created. There is no hint in *Parker* or *Richmond* that the differences between Mississippi's jury sentencing statute and Florida's split jury-judge sentencing procedure or Arizona's judge sentencing system would result in a *Teague*-barred rule. In *Richmond*, Justice Thomas, concurring, stated explicitly what the absence of any *Teague* discussion implies. He noted that the State did not claim that *Richmond* created a new rule under *Teague*, because "a *Teague* defense is foreclosed by *Stringer v. Black*, 503 U.S. 222 . . . , which held that 'there was no arguable basis' in February 1985 to support the view than an appellate court in a weighing State 'was permitted to apply a rule of automatic affirmance to any death sentence supported by multiple aggravating factors, when one is invalid.'" *Richmond*, 506 U.S. at 53-53 (parallel citations omitted). Indeed, as far as Sanders can determine, neither this Court nor any circuit since *Stringer* has that found a *Clemons* appellate-review claim to be *Teague* barred. *See Beardslee v. Brown*, 393 F.3d at 1040-41.

Finally, the State urges review of its *Teague* claim because it fears that the ruling in this case may affect at least 20 other California capital cases. Petition at 11 n.4. Its prediction is wholly unsupported. The impact of this case depends not, as the State seems to suggest, on whether the California Supreme Court has invalidated special circumstances in 20 other capital cases but (1) whether it failed to conduct adequate harmless error review in those cases and, if so,

(2) whether the jury's weighing of the invalid special circumstance was prejudicial. In the 15 years since *Clemons* was decided, there has been no deluge of *Clemons* claims flooding the federal courts in California. The Ninth Circuit has addressed only five such claims and has granted habeas relief under *Clemons* in only one case – this one. *See Allen v. Woodford*, __ F.3d __, 2005 WL 127041 at * 28-31 (9th Cir. 2005) (holding that the invalidation of a duplicative multiple-murder special circumstance was not prejudicial); *Beardslee v. Brown*, 393 F.3d at 1041-44 (holding that the jury's consideration of two invalid special circumstances, which resulted in *Clemons* error, was not prejudicial); *Morales v. Woodford*, 388 F.3d 1159, 1169-72 (9th Cir. 2004) (holding that the jury's consideration of an invalid torture special circumstance, which resulted in *Clemons* error, was not prejudicial); *Williams v. Calderon*, 52 F.3d 1465, 1479 (9th Cir. 1995) (holding that California's 1977 death penalty scheme was nonweighing), *cert. denied*, 516 U.S. 1124 (1996). The State's insinuation that the decision in this case will open the floodgates to unwarranted habeas relief in capital cases is specious. This Court should deny review of Question 2.

III. THE STATE SHOULD NOT BE HEARD TO CHALLENGE THE DECISION THAT CALIFORNIA SUPREME COURT CONDUCTED INADEQUATE HARMLESS ERROR REVIEW UNDER *CLEMONS v. MISSISSIPPI* WITH AN UNTENABLE THEORY THAT IT NEVER ARGUED IN THE COURTS BELOW AND THAT FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The State seeks review of the decision that the California Supreme Court conducted inadequate harmless error analysis after invalidating two of the four special circumstances the jury weighed in sentencing Sanders to death. Petition at 13. The Court of Appeals held that "[a]lthough the California court did apparently conduct some type of harmless-error analysis, it did not find, as it was required to do, that the error was harmless beyond a reasonable doubt." App. A at 9004. In reaching this conclusion, the Circuit Court analyzed the relevant portions of

the California Supreme Court's direct appeal opinion, drew an extended analogy between this case and the state court review found inadequate in *Sochor v. Florida*, 504 U.S. 527, noted that the California court never used the words "harmless error" or "reasonable doubt" in assessing the effect of the two invalid special circumstances, and found that the California court erroneously believed it could apply the rule of *Zant v. Stephens*, 462 U.S. 862, to uphold the death verdict because there remained two valid special circumstances. App. A at 9004-06.

The State disputes only one aspect of the Circuit Court's analysis – "its fault[ing] the state court for not using the words 'harmless error' or 'reasonable doubt.'" Petition at 13.[5] The State conjures a convoluted new theory to justify review on certiorari. It argues that (1) this Court should read the state court's decision as applying the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967), in this case, even though the decision mentions neither "harmless error" nor "reasonable doubt," because (2) the state court in this case cited to two prior state court decisions, *Allen* and *Silva*, which applied the state law "reasonable possibility" test to assess the impact of invalid special circumstances on the sentence selection process, and (3) 13 years after affirming the death sentence in this case, the state court in a footnote in another case observed that its "reasonable possibility" test was equivalent to the *Chapman* harmless error standard. Petition at 13. The question is not worthy of review on certiorari because it is raised too late, fails to present a substantial federal question, and, on the

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[5] The limited focus of Question 3 disregards much of the Circuit Court's analysis of the inadequacy of the state court's review, including the analogy drawn between this case and *Sochor v. Florida*, 504 U.S. 527. *See*, App. A at 9004-05. The State does not even intimate that this analogy is inaccurate. It also is important to note that the State does not challenge the Circuit Court's decision that the consideration of the two invalid special circumstances had a substantial and injurious effect or influence on Sanders's death sentence under *Brecht v. Abrahamson*, 506 U.S. 619, 638 (1993) and *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Accordingly, Sanders restricts his discussion to the narrow question raised by the State.

merits, is ill-considered at best.

As with the other questions presented for review, the State here seeks certiorari on a novel argument that it never presented to the District Court or the Court of Appeals. In the courts below, the State argued that the California Supreme Court's conclusions that the effect of the heinous-murder and burglary-murder special circumstances was "benign" and that there was "little chance" that the burglary-murder special circumstance prejudiced Sanders satisfied the *Chapman* standard. *Sanders v. Woodford*, No. 01-99017, Appellee's Brief at 45-46. As with the State's other questions, its failure to raise below the argument it asserts now should foreclose review in this Court. *See ante* at pages 5-7 and 13-15.

Moreover, the question does not qualify for review on certiorari because it involves only the application of a well-settled principle to a specific situation and does not raise a substantial, undecided issue of federal law. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The State proposes that the state court complied with the *Chapman* harmless error standard by what might be termed "indirect and retrospective incorporation" because years after deciding this case, it stated in another case, *People v. Jones*, 29 Cal.4th 1229, 1264 n.11, 64 P.3d 762, 785 n.11 (2003), *cert. denied*, 540 U.S. 952 (2003), that the state law "reasonable possibility" standard was equivalent to *Chapman*'s "harmless beyond a reasonable doubt" test.[6]

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[6] The State, like the footnote in *Jones*, ignores a critical distinction between the state and federal harmless error standards. Under the California's "reasonable possibility" standard for non-federal constitutional errors at a penalty phase, the burden to prove prejudice rests with the defendant, *People v. Brown*, 46 Cal.3d 432, 448, 758 P.2d 1135, 1144-45 (1988), whereas under the federal constitutional harmless error standard, the burden is on the government to prove that the error "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. at 24.

Moreover, the State does not claim that this equivalence was established at the time Sanders's direct appeal was decided. On the contrary, the California Supreme Court distinguished between the federal constitutional and state law harmless error standards and treated (continued...)

The footnoted comment in another case in 2003 cannot reach back to cure the state court's constitutionally inadequate review of this case in 1990. In *Stringer*, this Court rejected a similar argument when the State of Mississippi attempted to rely on *Lowenfield v. Phelps*, 484 U.S. 231 (1988) to argue that the holding in *Clemons* that Mississippi's heinous, atrocious and cruel aggravating circumstance was unconstitutionally vague created a new rule under *Teague*. *Stringer v. Black*, 503 U.S. at 236 ("It is a fiction for the State to contend that in 1984 its courts relied on a 1988 decision.") The Court also should reject the State's argument here.

But even if the state court had announced a new construction of the state law "reasonable possibility" test before it had decided Sanders's direct appeal, its review still would have been insufficient under *Clemons*. Contrary to the State's suggestion, the citation to the decisions in *People v. Allen*, 42 Cal.3d 1222, 1281, 729 P.2d 115, 152-53 (1986), *cert. denied*, 484 U.S. 872 (1987), and *People v. Silva*, 45 Cal.3d 604, 632-36, 754 P.2d 1070, 1085-87 (1988), *cert. denied*, 488 U.S. 1019 (1989), which applied the "reasonable possibility" standard, is not a proxy for harmless error analysis. Rejecting the State of Florida's similar argument in *Sochor v. Florida*, 504 U.S. 527, 540 (1992), this Court ruled that "allusions by citation . . . cannot even arguably substitute for explicit language signifying that the State Supreme Court reviewed for harmless error." The same holds true here. There simply is no evidence in the direct appeal decision that the California Supreme Court conducted the scrupulous harmless error analysis mandated by *Clemons*. The Court should deny review of Question 3.

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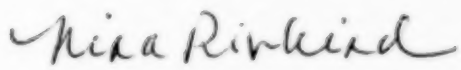
[6] (...continued)
them as distinct tests. *See People v. Brown*, 46 Cal.3d at 447-48, 758 P.2d at 1144-45 (adhering to state "reasonable possibility" test for reviewing non-federal errors at a capital penalty phase); *People v. Gordon*, 50 Cal.3d 1223, 1267, 792 P.2d 251, 278 (1990) (applying both state "reasonable possibility" and federal *Chapman* standards), *cert. denied*, 499 U.S. 913 (1991).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: February 9, 2005.

Respectfully Submitted,



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